IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 88.

NATHAN D. GUTMAN and SAMUEL MARION,
Petitioners,

against

ALEXANDER GUTTMAN, GEORGE GELLER and ARTHUR BAINTON, Etc., et al.
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONERS.

SAMUEL MARION,
Attorney for Petitioners.

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OPINIONS BELOW.

The opinion of the bankruptcy court, Gibson, D. J., is reported in 69 Fed. Sup. 656 under the title "*In re Pittsburgh Terminal Coal Corp.*" It is printed in the Record at pages 18-23.

The opinion of the Special Term of the New York Supreme Court is reported (unofficially) in 71 N. Y. S. 2d 200. It appears at pages 25-26 of the Record.

The decision of the New York Appellate Division, without opinion, is reported in 272 App. Div. 896, 72 N. Y. S. (2d) 406. (R. p. 29).

The opinion of the Court of Appeals is reported in 297 N. Y. 201 and is printed in the Record at pages 31-36.

GROUNDS OF JURISDICTION.

The judgment of the Court of Appeals of the State of New York dismissing the complaint on the ground that the New York Supreme Court had no jurisdiction, and that jurisdiction of the cause of action involving a claim for legal services rendered in connection with a Chapter X Reorganization Proceeding was vested solely in the bankruptcy court (R. pp. 31-39) comes before this Court on a Writ of Certiorari granted October 11, 1948. The jurisdiction of this Court was invoked under Section 237b of the Judicial Code, Title 28 U. S. C., Section 344b.

QUESTION PRESENTED.

Do Sections 221, 241, 242 and 243, 11 U. S. C. § 621, 641-643, or other provisions of the Bankruptcy Act, bar attorneys from suing clients in State courts of general jurisdiction, or in any other court, to enforce a contract, or for quantum meruit, for services rendered to clients in the course of a reorganization proceeding under Chapter X of the Bankruptcy Law which are not for the benefit of the estate and are not chargeable to the Debtor's Estate where

(1) the contract with and claim against the clients and all facts relating thereto have been fully and fairly disclosed to the bankruptcy court,

(2) the bankruptcy court, after a thorough hearing, finds that the attorneys rendered services to the clients which are not compensable out of the estate and which should be paid for by the clients, but questions are raised as to the amount and manner of payment,

(3) the bankruptcy court finds that those issues and the determination thereof are not germane to, do not concern and are foreign to the reorganization plan previously approved and to the reorganization proceedings, and

(4) the bankruptcy court makes an award to the attorneys, out of the estate, for such of their services as inured to the benefit of the estate and are properly compensable out of the estate, without prejudice to the rights petitioners may have against the clients in respect to the other services which the attorneys rendered to the clients, not compensable out of the Debtor's Estate?

The foregoing question divides itself into two parts:

(a) In the circumstances indicated in the question, does the bankruptcy court have jurisdiction to determine the controversy between the attorneys and their clients in respect to the services which were not chargeable to the Debtor's Estate; if it has such jurisdiction, can it enforce its decision by entering a personal judgment against the clients?

(b) If the court does have that jurisdiction, was it bound to exercise it, and determine all issues which in any way arise out of the reorganization proceedings, regardless of whether or not they affect or concern those proceedings or a plan of reorganization? Is the court deprived of the right to determine that (in the circumstances before it) it is more appropriate to have the issues (personal to the attorneys and their clients), determined in an action in a court of competent jurisdiction?

STATEMENT OF THE CASE.

During the pendency of Chapter X proceedings for the reorganization of Pittsburgh Terminal Coal Corp., petitioners were retained by a preferred stockholders' committee to represent the interests of the preferred stockholders.

Some of the preferred stockholders (including respondents),* asserted claims for certain moneys alleged to be due on preferred stock certificates under the sinking fund provisions relating thereto. For the assertion and prosecution of their claims "and for other services in connection with the said reorganization proceedings", the respondents agreed to pay to the attorneys "in addition to any sum allowed by the court" 20% of their preferred stock. In pursuance of that agreement 584 shares of the preferred stock of the Debtor were escrowed with the chairman of the committee by the respondents, for delivery to the attorneys at the conclusion of the reorganization proceedings.**

In the course of the reorganization proceedings, the petitioners and an associate attorney rendered services which were for the benefit of the estate, as well as services which were in controversies with the estate and its trustee or were otherwise exclusively beneficial to the stockholder clients, without benefit to the estate (R. pp. 12, 14).

When a plan of reorganization came up for consideration and confirmation, the petitioners and their associate applied to the bankruptcy court for the fixation and allowance of their fees and expenses. In that application, they made full disclosure of their contract and called attention to the fact that the respondents had repudiated it.

The Securities and Exchange Commission at the hearing on said application recommended to the Court

> "that for the compensable services, that is for the services for which the Court has the power to com-

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* The fee agreement did not affect all preferred stockholders who authorized the Committee to act, but only respondents.

** The quotations are from the Complaint, R. pp. 8-9. The agreement annexed to the Complaint was prepared by the respondents.

pensate them, the services which were of benefit to the estate, we recommend a final allowance to these attorneys for the preferred stockholders' committee in the sum of $40,000. * * * " (R. p. 12)

The District Judge fixed the allowance to petitioners at $37,500. Subsequently, the District Judge held a full hearing "as to the scope of the deposit" of the stock referred to in the complaint as additional compensation to petitioners (R. p. 13). At that hearing, the S. E. C. submitted a memorandum which stated, at page 31,

> "In our opinion, the reasonable value of all claimants' services is $70,000. This figure covers both services compensable out of the estate and those not so compensable."

After referring to the various conflicting contentions as to the value of the services and the method of payment therefor, and as to the extent of the court's jurisdiction, the court held that those disputes were not a controversy which it should adjudicate. The court adjudicated all that it thought germane to the reorganization proceedings, and as to all other matters relegated the parties to their normal remedies (R. pp. 18-23).

In its opinion, the District Court found that petitioners had rendered services to the preferred stockholders which were not chargeable to the Debtor's Estate; that for said services petitioners were entitled to a reasonable recompense; that the District Court did not have jurisdiction to determine the claim against the depositing stockholders and to make the allowance a direct charge against the depositing stockholders; "that the existence and scope of the promise creates an issue not before the court"; and entered an order that the allowance made to petitioners was without prejudice to such rights as petitioners had under the agreement annexed to the complaint. (*In the Matter of Pittsburgh Terminal Coal Corp.*, 69 Fed. Sup. 656; R. pp. 17-23.)

An appeal from said order was taken to the Circuit Court of Appeals, Third Circuit, by the respondents. Said appeal was dismissed by order of the C. C. A. dated June 25, 1947.

An action was thereafter commenced in the New York Supreme Court to recover for the services for which the Debtor could not be charged and to recover the stock deposited in escrow as compensation for said services, and for other relief [1] (Complaint, R. pp. 8-11). Respondents moved to dismiss the complaint on the sole ground that the Court had no jurisdiction of the subject matter of the action; that such jurisdiction is vested solely in the bankruptcy court.[2] The motion was denied at Special Term;[3] the Appellate Division of the New York Supreme Court affirmed;[4] but the Court of Appeals, by a four to three decision, reversed [5] and dismissed the complaint on the sole ground that under the Bankruptcy Act, the State court lacked jurisdiction and that jurisdiction of this controversy was vested solely in the bankruptcy court. In its opinion, the Court of Appeals ruled

> "that the district judge misapprehended the duty imposed upon him by Section 221 of the (Bankruptcy) act." (R. p. 34)

THE ISSUES RAISED.

Jurisdiction of this suit by the New York Supreme Court depends on whether the Bankruptcy Act grants exclusive ju-

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[1] The respondents reside in New York and the stock certificates involved in this action are in New York.

[2] This motion was made under Rule 107, subdivision 2 of the New York Rules of Civil Practice (R. p. 3) which provides:

> "After the service of the complaint, the defendant may serve notice of motion for judgment dismissing the complaint * * * on the complaint and an affidavit stating facts tending to show:
> "* * *
> "2. That the court has no jurisdiction of the subject of the action."

[3] It is not clear from the opinion of the Special Term whether the decision denying the motion rested on deference to the views of the bankruptcy court as to its own lack of jurisdiction or upon the conclusion that the bankruptcy court's determination was res adjudicata. Although this point was argued in the Court of Appeals, that Court did not pass on it.

[4] 272 App. Div. 806.

[5] 297 N. Y. 201

risdiction to the district court over a fee agreement between attorneys and clients for services rendered in connection with a Chapter X Reorganization Proceeding, where the services are not beneficial to the debtor, are not chargeable to the debtor's estate, and where after disclosure and a full hearing, the district court finds that the attorneys are entitled to compensation and declines jurisdiction to determine the value of such services.

May the district court consent to the adjudication of those rights in another forum?

The nature of this suit is not in dispute. No bankruptcy controversy is involved. No reorganization problem is presented. No property of the debtor or under the control or possession of the court is in litigation. Cf. *Mueller* v. *Nugent* (1901), 184 U. S. 1, 14-15.

THE APPLICABLE PROVISIONS OF THE BANKRUPTCY ACT.

Chapter X, by its terms, excludes from its scope controversy such as this. Section 101, 11 U. S. C. § 501, states:

> "The provisions of this chapter shall apply *exclusively* to proceedings *under* this chapter." (Italics supplied)

Section 111, Bankruptcy Act, 11 U. S. C. § 511, provides that the bankruptcy court has "exclusive jurisdiction of the debtor and its property". The claim, which is the subject of this litigation, does not affect the debtor, its property, or the plan of reorganization approved by the Court.

Generally the court's powers in Chapter X Proceedings are the same as in bankruptcy proceedings, with the addition of the powers which formerly were exercised in equity receiverships (Sections 112-116, 11 U. S. C. §§ 512-516).

Creditors and stockholders are specifically authorized to "act in person, by an attorney at law, or by a duly authorized agent or committee" (Sec. 209, 11 U. S. C. § 609) and representatives are required to file specified statements (Secs. 210-211, 11 U. S. C. §§ 610-611).

Section 212, 11 U. S. C. §612, reads as follows:

> "The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee, or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation or in the course of the proceeding under this chapter to the actual consideration paid therefor."

This language does not include fee agreements with attorneys-at-law for legal services. The language of this section is permissive and not mandatory. This section applies only to cases of such over-reaching, oppression, or a violation of law or public policy as requires the intervention of the court. Even regardless of this section, the courts would have inherent power of control of the attorneys practicing before it.

Assuming, however, that this section empowered the District Court to pass on the agreement in suit, before the Court could interfere with the agreement between the parties, it would be obliged to find the agreement "to be unfair or not consistent with public policy". The Court made no such finding. On the contrary, it found that petitioners rendered services to the respondents which were not compensable from the fund distributed by order of the Court; and that such services "are entitled to a reasonable recompense" (R. p. 20).

Section 212, Bankruptcy Act, 11 U. S. C., § 512 grants permissive power to modify any agreement which the judge finds to be "unfair or not consistent with public policy". Disregarding the question whether this section covers a private fee agreement between attorney and client, the fact is that the judge, after a full hearing, made no finding that the agreement in suit is "unfair or not consistent with public

policy", but did find that petitioners are unquestionably entitled to compensation for the services rendered to respondents which were not chargeable to the Debtor's Estate (R. p. 20).

Section 221 (4), Bankruptcy Act, 11 U. S. C., § 621 (4) deals with the confirmation of a plan of reorganization. It provides:

> "Sec. 221. The judge shall confirm a plan if satisfied that——
>
> * * * *
>
> "(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;
>
> "(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other persons, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable, or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge." [6]

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[6] In a decision dated September 12, 1947, the District Judge said:

"The court investigated all promises of payments which might affect the plan of reorganization prior to its approval. Having done so it approved the plan. In due time it fixed the compensation of counsel concerned, among them Messrs. Marion, Berkman and Leiman, and ordered the Trustee to pay them for the benefits which resulted from their services to the reorganization. It did not, and could not, order the Preferred Shareholders to pay to their counsel an amount to cover non-compensable services rendered to the shareholders.

"It is urged on behalf of the former appellants that litigation in a state court on the claim for additional compensation might result in an award to claimants that would include an amount which had already been included in the order of this court granting the compensable allowance. As to this allegation it must be kept in mind that the burden will be upon plaintiffs to distinguish between compensable services already allowed, and non-compensable services, and it is not to be assumed by this court that the hearing court will make an erroneous finding."

Sections 241-250, Bankruptcy Act, 11 U. S. C. §§ 641-650, deal with allowances. In respect to allowances to creditors and stockholders and their attorneys, Section 243 provides:

> "The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

The language of this section is permissive, not mandatory.

The bankruptcy court, in this case, complied with this section, and allowed the petitioners an amount the court deemed fair for such of their services as were compensable out of the estate. It was only as to the residue of the services that the court relegated the petitioners to their ordinary remedies.

SPECIFICATION OF ERRORS.

The Court of Appeals of the State of New York erred:

1. In holding that the jurisdiction over this action was solely vested in the bankruptcy court under Section 221, Bankruptcy Act, 11 U. S. C. § 621.

2. In dismissing the complaint on the sole ground that the New York Supreme Court had no jurisdiction over this action.

POINT 4.

THE BANKRUPTCY ACT DOES NOT DEPRIVE STATE COURTS OF JURISDICTION OF A FEE CLAIM FOR SERVICES RENDERED IN A CHAPTER X PROCEEDING, WHERE THE COMPENSATION IS NOT TO BE CHARGED TO THE DEBTOR AND DOES NOT AFFECT A PLAN.

The New York Court of Appeals, in dismissing the complaint on the sole ground that the jurisdiction of the federal courts of "all matters and proceedings in bankruptcy is exclusive of the courts of the several States" (R. p. 33) held, that "the bankruptcy courts have plenary power to review all fees and expenses in connection with the reorganization from whatever source they may be payable." In its decision, it cited *Woods v. City National Bank & Trust Company*, 312 U. S. 262, 267, and *Brown v. Gerdes*, 321 U. S. 178. Neither of the cases cited deal directly with a case such as this, where the services for which recovery is sought, are not chargeable to the Debtor's Estate, have no bearing on a plan of reorganization, or the reorganization proceedings.

In the *Brown* case, the question involved was

> "Whether the New York court or the Federal bankruptcy court has the power to fix the fees of petitioners who as attorneys represented the bankruptcy estate in litigation in the State courts."

That case differs from the case at bar in that the recovery for services was by the attorneys who had been appointed by the Federal Court, represented the bankruptcy estate and the fees would necessarily be paid out of the bankruptcy estate. The case at bar differs in that services were rendered by an attorney for his client, not for the bankruptcy estate, and the compensation was to be paid not by the bankruptcy estate but by the client. As this Court in its opinion in the *Brown* case stated:

The Court cited (U. S. Const. Art. 1, §8; U. S. Code, tit. 28, §371, par. [sixth]); Sections 221, 241, 242, 243, Bankruptcy Act (U. S. Code, tit. 11, §§621, 641, 642, 643)

"Sec. 77b, like § 77 of the Bankruptcy Act, had as one of its purposes the establishment of more effective control over reorganization expenses (cases cited) in recognition of the effect which a depletion of the cash resources of the Estate may have on both the fairness and feasibility of the plan of reorganization."

"* * * *

"Moreover, a plan of reorganization must provide 'for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge.' § 216 (3).

"Thus Chapter X not only contains detailed machinery governing all claims for allowances from the estate."

* * * * * * *

And at page 87:

"Whatever doubts may have once existed as to the functions of a reorganization court, it is clear under this recent bankruptcy legislation that the approval of *all fees as part of the plan* has been entrusted to the bankruptcy court exclusively." (Italics supplied.)

In the *Woods* case,[8] the basic question involved was the power of the District Court to disallow claims for compensation on the ground that the claimants were serving dual or conflicting interests. The claims in that case covered not only 77B proceeding but also earlier State court proceedings.

In that case also the fees claimed were to be paid out of the bankruptcy estate.

There is no doubt that if the fees sought to be recovered here were to be paid out of the bankruptcy estate, sole jurisdiction would be vested in the bankruptcy court. But it is respectfully submitted that the bankruptcy court is not concerned with fees not payable out of the bankruptcy estate, where such fees do not in anyway affect the reorganization.

[8] 312 U. S. 262, 267.

proceedings or the plan before the court. The bankruptcy court is not concerned with an agreement between an attorney and client for services rendered, merely because such services were incidentally involved in a reorganization proceeding, and which were in fact, at least in part, hostile to the Debtor.

A. Bankruptcy courts have only such jurisdiction and powers as are expressly or impliedly conferred on them by Congress.

There is no provision in the Bankruptcy Act granting jurisdiction to the bankruptcy court over fee agreements not affecting the bankruptcy estate. The exclusive jurisdiction of bankruptcy courts over bankrupts and their property, which is exercised in summary form, extends only to the person of the bankrupt and to property in his possession or in the possession of third persons who do not claim adversely to him or whose claims are colorable only. See *In re Standard Gas & Electric Co.* (C. C. A., Del., 1941), 119 F. 2d, 658.

The failure of laws to provide authority to act in any particular contingency results in a lacuna of jurisdiction. *In re Fox West Coast Theatres* (D. C., Cal., 1936), 25 F. Supp. 250, Affirmed 88 F. 2d 212 c. d. 57 S. Court 944, 301 U. S. 710.

B. Section 221(4) of the Bankruptcy Act does not apply to fees not chargeable to the debtor.

1. The payments or promises referred to in § 221 (4) are "by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person". "Any other person", thus associated with the words "the debtor * * * by a corporation * * * under the plan", means only such persons as are associated with the debtor in the plan. The principle of *ejusdem generis* appears to be applicable.

2. The limitation of the section to payments and promises "for services * * * in, or in connection with the proceeding or in connection with the plan and incident to the reorganiza-

tion;" encompasses only payments or promises which in some way affect the reorganization, such as (a) payments or promises for services to the estate, (b) payments or promises which condition or affect the plan of reorganization, (c) payments made or to be made out of the estate or by the reorganized corporation or out of assets destined to or which otherwise would reach the debtor or its creditors.

3. The description of the payments or promises, as well as the enumeration of the payers or promisors, exclude from the scope of the section payments or promises which have no bearing on the reorganization, and which do not in any way affect it.

4. That conclusion is further supported by the requirement that if any payment or promise is not reasonable, the plan shall not be confirmed. That is the prescribed consequence; no alternative or other corrective course is provided in that section. It was not the intention of Congress to defeat a desirable and beneficent plan because of a payment or promise which does not enter into it and is wholly extraneous to it.

5. Moreover, the refusal to approve a plan because of the unreasonableness of payments or promises which are not dependent upon allowance by the court can serve as the corrective pressure, and be operative as such, only on those whose interests require the approval of a proposed plan. The choice of that method of control also indicates the limitation of the intended scope of the supervision and control to the payments and promises which enter into, condition or affect the reorganization.

6. That there is such a limitation appears from still another consideration. The fees to attorneys who defend litigation brought by the trustee, or who institute and conduct proceedings against the trustee, or who advise persons with whom the trustee contracts while carrying on the business of

the debtor, would not be subject to the supervision of the bankruptcy court even though all of such services arise out of, and are connected with the reorganization proceedings. The bankruptcy court is not concerned with such fees or promises because they do not impair the *res* which the court has administered. This is also true in respect to other services which the court finds were rendered, not for the benefit of the estate, and the compensation for which is not chargeable to and is of no interest to the reorganization and of no concern to the court.

7. Apposite here is the holding in *In re P-R Holding Corp.*, 147 F. 2d 895 (C. C. A., 2nd Cir., 1945),[9] that Section 221 (4) "obviously was not intended to require (the disclosure to) and the approval by the court of matters like the commissions paid a broker for the purchase of creditors' certificates" by the proponents of a plan in order to eliminate opposition thereto.

This argument does not necessarily equally limit the scope of the required disclosure, for it is for the court (and not the interested persons) to decide what does and what does not affect the reorganization. The contention here is only that where the court, after full disclosure and consideration, decides that certain payments or promises or claims do not affect or concern the reorganization or the court, Section 221 (4) of the Bankruptcy Act does not empower, much less compel, the bankruptcy court to render final judgment between the interested parties. The bankruptcy court is not concerned with matters not involving the *res* the court is administering, the Debtor's Estate, or the formulation,

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[9] In *P-R Holding Corp.*, 147 F. 2d 895 (C. C. A. 2d Cir., 1945) the Court in discussing Section 221(4); 11 U. S. C. § 621(4) said:

"But the basic purpose of Chapter X is to procure a plan which will best serve the parties legitimately interested; * * *."

* * * * *

"It is true that Section 221(4), 11 U. S. C. A. Section 621(4), requires that all compensation for services rendered in the Reorganization proceeding or in connection with a plan be submitted to judicial scrutiny * * * but it obviously was not intended to require the approval by the Court of matters like the commissions paid a broker for the purchase of creditors certificates."

promulgation or approval and acceptance of a plan of reorganization. With the exception of the *McCrory* and *Reading* cases [10] the courts have deliberately abstained from passing on the rights of attorneys to payment by their clients, other than the Debtor. Although there is no express statement that the Court is without jurisdiction in such matters, such a holding is implicit in them.

C. The federal courts have frequently declined to pass on fee arrangements between attorneys and clients, where compensation is to be paid by the clients for whom the services were rendered, where such services cannot be charged to the debtor, in reorganization proceedings.

In the *Zweifel* case,[11] the court refused to make an allowance to attorneys who had performed services for the Estate. The Debtor had agreed to pay these attorneys $10,000. *after the Estate should be closed.* The District Court found that this was more than the value of their services; that the agreement was not binding on the Court in the Chapter X proceeding and that

> "it had no jurisdiction to determine its validity as an obligation of the debtor. * * * leaving the attorneys free to pursue the matter otherwise as they saw fit."

Undoubtedly the Court's ruling was predicated on the fact that this $10,000. fee was payable after the Estate was closed; and that it had no bearing on the plan or the administration of the Debtor's Estate.

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[10] *In re McCrory Stores Corp.*, 19 Fed. Sup. 917, aff'd 91 F. 2d 947, cert. den. 302 U. S. 725.

In re Philadelphia & Reading Coal & Iron Co., 61 F. Supp. 120 (E. D. Pa., 1945).

[11] *Zweifel; Twolley and Crozier, et al. v. Trans-State Oil Co.*, 99 F. 2d 650 (C. C. A. 5th Cir., 1938).

In the *Mt. Forest Fur Farms* case,[12] the Circuit Court of Appeals said:

> "The District Court found that the services of these attorneys did not aid in the general administration of the estate of the debtor corporation; that their services in connection with formulation of the plan were primarily for the benefit of their special clients; that they have a lien for their fees on the stock to be distributed to their clients, to which they should resort for their fees for services rendered. No abuse of discretion on the part of the District Court appears . . ." (at p. 649)

In the *Greensfelder* case,[13] the plan of reorganization provided that the "Reorganized company shall pay in cash all costs and expenses of administration and other allowances which may be approved by the Court". The Court held (R. p. 60):

> "Such costs and expenses of administration do not include fees for services rendered primarily in the interests of private clients. They include only the services rendered in advancement of the reorganization proceedings and for the benefit of the Estate." (cases cited)
>
> "In the proceedings for the allowance of the fees, the court was not concerned with the question of the amount of fees which Mr. Greensfelder's client or the noteholders' committee might be obligated to pay him."

To the same effect are:

> *In re Standard Gas & Electric Co.*, 106 F. 2d 215, 216 (C. C. A., 3rd C., 1939);

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[12] *In re Mt. Forest Fur Farms of America, Inc.*, 157 F. 2d 640 (C. C. A., 6th Cir., 1946).

[13] *Greensfelder, et al. v. St. Louis Public Service Co., et al.*, 114 F. 2d 53, 59-60, 62 (claim of Carter), 63-64 (claims of Greensfelder and Stein), (C. C. A., 8th Cir., 1940, cert. den. 311 U. S. 714).

In re Watco Corporation, 95 F. 2d 249, 251-2 (C. C. A., 7th C., 1938);

In re Middlewest Utilities Co., 17 F. Sup. 359, 377 (N. D. Ill., 1936).

See also:

In re Paramount-Publix Corporation, 12 F. Sup. 823 (S. D. N. Y., 1935);

London v. *Snyder*, 163 F. 2d 621 (C. C. A., 8th C., 1947);

Cooke v. *Bowersock*, 122 F. 2d 977 (C. C. A., 8th C., 1941) and particularly the next to the last paragraph (at p. 985).

The only exceptions to this line of cases is *In Re McCrory Stores Corp.*, 19 Fed. Sup. 917, affirmed 91 F. 2d 947, c. d. 302 U. S. 725. In this case, the court held that a fee contract with an attorney by a committee of creditors in behalf of the creditors whom they represented, as distinguished from a fee agreement between an attorney and a principal, was subject to the court's revisionary jurisdiction.[14]

However, whatever may be the correct answer, on the basis of authority, to the first branch of the question, there is no precedent for the holding that the bankruptcy court is bound to finally adjudicate all fee questions between attorneys and the clients for whom they appear in reorganization proceedings, regardless of the facts and circumstances and regardless of whether that fee question affects the formulation and ratification of a plan or the administration of the Debtor's Estate, or the reorganization proceeding. That is the deci-

[14] *In re Philadelphia & Reading Coal & Iron Co.*, 61 F. Supp. 120, the court made an allowance for non-compensable as well as for compensable services.

sive question, here.[15] On that question, substantially all of the federal decisions are contrary to the decision rendered herein by the New York Court of Appeals.

The fee agreement in question here had no bearing on or relationship to the plan. It did not vitiate or otherwise affect the plan in any way. It was not a charge on the Debtor's assets and did not affect the reorganization proceeding or the administration of the Debtor's estate. It was a private agreement between attorneys and clients, which provided for compensation for services "hostile to, and not of benefit to the Trustee's action" and "which were not compensable from the fund distributed by order of the court" (R. p. 20). The court held an extended hearing as to the scope of the agreement and if it was intended to be payment for non-compensable services.

The Court found that petitioners had, at the request of respondents, rendered services not compensable from the Debtor's Estate; that for such services, they were entitled to compensation, but that the existence and scope of the agreement was an issue not before the Court (R. p. 21); that no fund has been credited to the depositing stockholders against which any allowance to the attorneys could be charged; and finally, that the court had no jurisdiction to make such a charge against the depositing stockholders (R. p. 23).

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[15] The District Judge, in passing on the claim that this section of the Act imposed on him the duty of passing on the fee claim involved here followed these decisions, stating (R. p.):

"Undoubtedly Section 221(4) requires the court to scrutinize the proposed plant in respect to all phases mentioned in it, and to determine whether the payments made or promised are reasonable or whether they tend to vitiate the plan. But nowhere in it is it recited that the court has the duty of both determining that such an amount paid or promised is reasonable and of making an order requiring the payment of such amount even though it cannot be charged to the fund for distribution. Under Chapter X administrative expenses are authorized, and those who have aided in the reorganization are entitled to compensation for their efforts; but they are awarded such compensation by means of an order upon the trustee by the court. If one had promised compensation to his counsel for his services in a reorganization, but his counsel has not aided in the proceeding, Section 221(4), in the opinion of the court (fol. 32), furnishes no authority for an order, upon the promisor to pay the counsel the amount promised or what, in the opinion of the court, is the reasonable value of his services. The existence and scope of the promise creates an issue not before the court."

The Act deals only with the reorganization of a debtor, its assets and business. It is not concerned with private fee agreements between attorneys and clients relating to legal services rendered in a reorganization proceeding, unless such services relate to a plan of reorganization, its proposal or acceptance, or are "incident to the reorganization".

D. The federal court has consented to the adjudication of the claim in suit by the state courts.

The bankruptcy court here has in effect consented to the adjudication of the claim in suit by the State courts. *In re Matter of Brown (Gerdes)*, 290 N. Y. 468, Judge Finch, in writing the opinion of the Court, said:

> "It is urged that the bankruptcy court could have consented to an adjudication of rights in this real property by our State Courts. * * * That, of course, is true. * * * consent * * * must be for a particular controversy. Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 483."

Justice Frankfurter, in his concurring opinion in the *Brown* [16] case, said, at page 190:

> "Congress from the beginning has allowed federally created rights to be enforced in state courts not only by the general implications of our legal system but also by explicit authorization. The nature of the obligation of the state court under such legislation has been most litigated in connection with the Federal Employers Liability Act * * *."

There is no affirmative policy to enlarge federal jurisdiction. The policy is to leave State issues to State courts, leavink the determination of what intrinsically are merely local questions to the local courts of the State. *Bardes v. First National Bank of Hancarden*, 178 U. S. 524 at 538.

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[16] 321 U. S. 178.

> "The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice."
>
> *Lathrop* v. *Drake* (1875), 91 U. S. 516, 518.

For the reasons hereinbefore set forth, the State courts afford an adequate forum for this suit.

POINT II.

THE JUDGMENT BELOW SHOULD BE REVERSED.

The issue in this case is one of first impression. Inasmuch as the compensation sought is not to be paid out of the Debtor's Estate and is for services not beneficial to the Estate and for which the Estate is not chargeable, it is respectfully submitted that the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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